

1 Raymond Franks
2 California State Prison, Solano
3 P.O. Box 4000, Bldg 12, Cell 234
4 Vacaville, CA. 95696
5 CDC No. V-D8354

Original
FILED

MAR 19 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

SBA
(PR)

8 In The United States District Court for the Northern District of California

9
10 Raymond Franks,
11 Petitioner,
12
13 v.
14 D.K. Sisto, Warden,
Respondent

No **CV 08 1525**
Motion To Stay and Hold In Abeyance
Petition for A Writ of Habeas Corpus

16 To: The Honorable Judge for the United States District Court
17 for the Northern District of California:

18
19 Petitioner, on his own behalf, moves the court for an order staying
20 and holding in abeyance the accompanying Petition for writ of habeas
21 corpus pending the exhaustion thereof, through the California State
22 Courts. This motion is made pursuant to 28 U.S.C.A. Section 2254(b)(1)
23 and is based on the attached declaration of Raymond Franks, Petitioner
24 in the above-entitled action.

25
26 *Raymond Franks*
27 Raymond Franks
28

1 In The State of California

2
3 County of Solano

ss.

Declaration of Raymond Franks In
Support of Motion To Stay and Hold
In Abeyance Petition for Writ of habeas
Corpus

4
5
6
7 I, Raymond Franks, under the Penalty of Perjury declare:

8
9 1. On September 4, 2003, Petitioner, in Alameda County Superior
10 Court in Case No. 145147 was convicted of one count of committing
11 continuous sexual abuse on a child under the age of 14 (Pen. Code §
12 288.5 subd. (a)), two counts of committing lewd and lascivious acts
13 on a child under the age of 14 (Pen. Code § 288 subd. (c)(1)), and one count
14 of committing a lewd and lascivious act on Ashlee O, a child under the
15 age of 14 (Pen. Code § 288 subd. (a)).

16
17 2. Petitioner admitted having suffered four Prior convictions and
18 being on Probation at the time he committed the charged offenses.
19 The trial court sentenced Petitioner to a total of 18 years in state
20 Prison consisting of the upper term of 16 years on count one, to be
21 served consecutively to a two-year midterm sentence on count four.

22
23 3. Petitioner filed a timely notice of appeal from the
24 judgment in the California Court of Appeal for the First Appellate District.

25
26 4. On February 18, 2005, the California Court of Appeal affirmed the
27 conviction and judgment. (See Accompanying Petition for Writ of habeas
28 Corpus (hereafter, "Petition") at Exhibit D, attached thereto.)

1 5. On April 27, 2005, the California Supreme Court denied
2 Petition for review. (See "Petition," at Exhibit E, attached thereto.)

3
4 6. On June 29, 2006, Petitioner filed a Petitioner for writ of habeas
5 Corpus in the California Supreme Court. (See "Petition," at Exhibit
6 G, attached thereto.)

7
8 7. On February 7, 2007, the California Supreme Court denied
9 Petition for writ of habeas Corpus without comment. (See "Petition,"
10 at Exhibit F, attached thereto.)

11
12 8. On January 22, 2008, Petitioner filed a second Petition for
13 writ of habeas corpus in Alameda County Superior Court. And
14 the Alameda County Superior Court denied that habeas Corpus
15 Petition on January 28, 2008. (See "Petition," at Exhibit H, attached
16 thereto.)

17
18 9. With this in mind, Petitioner admits that 90 days after April
19 27, 2005, i.e., July 27, 2005, the Antiterrorism and Effective
20 Death Penalty Act (hereafter, AEDPA) one-year statute of limitations
21 began to run. Hence, when Petitioner filed his first state habeas
22 Corpus on June 29, 2006, the AEDPA's statute of limitations was
23 tolled, until the California Supreme Court denied that Petition
24 on February 7, 2007, with a remainder of 27 days' worth of
25 the AEDPA limitations left. This establishes that the current Petition
26 for writ of habeas Corpus, accompanying this motion, is untimely filed.

27
28 10. The accompanying Petition for writ of habeas Corpus Presents

1 the following assignments of error :

2
3 a) Petitioner was denied his sixth amendment right of confrontation
4 because of the presence of a support person during both
5 complaining witness' testimony absent any particularized showing
6 of need for this procedure in this case.

7
8 b) The Court erred in admitting Officer Souza's testimony regarding
9 reporting dynamics among child witnesses absent sufficient
10 showing of his expert qualifications in this area, denying
11 petitioner due process of law and a fair trial.

12
13 c) The Court erred prejudicially in defining the offense of
14 residential child molestation under Penal code section 288.5
15 as a general intent crime denying Petitioner due process
16 of law, a fair trial, and his right to a jury determination
17 on all issues.

18
19 d) The trial Court erred prejudicially in failing to give CALJIC
20 No. 17.10 regarding the lesser battery offense, denying
21 petitioner due process of law and a fair trial.

22
23 e) The Court erred in instructing the jury with CALJIC NO.
24 2.21.2 because the instruction permitted evaluation of
25 the pivotal prosecution testimony by a probability standard,
26 denying petitioner due process of law.

27 //

28 //

f.) The cumulative effect of the errors discussed above deprived Petitioner of due Process of law and a fair trial and requires reversal of the judgment, or at a minimum, Petitioner's conviction under count one.

g.) The upper determinate term was imposed in violation of the sixth and fourteenth amendments guarantees of trial by jury, as recently interpreted by the Supreme Court in Blakely v. Washington.

h.) Trial Counsel was ineffective by his failure to enlist the testimony of a Psychiatrist

i.) Appellate Counsel was ineffective by his failure to raise a meritorious and/or arguable issue on appeal ^{1/}

Clearly the aforementioned claims are not frivolous, and when proven to be true, the claims will entitle Petitioner to habeas corpus relief.

Wherefore, Petitioner respectfully Prays: that after the Court considers the facts set forth herein, it file, stay, and hold in abeyance the accompanying Petition for writ of habeas Corpus

Alternatively, Petitioner Prays, should the court find that the

^{1/} Issues "h" and "i" are currently Pending in the California Court of Appeal in habeas Corpus Proceedings

1 apparent Procedural Problem of untimeliness should be addressed before
2 the accompanying Petition for writ of habeas Corpus is held in abeyance or
3 before the court reaches the merits of the claims raised in the Petition,
4 that the court order respondent to either (1) move to dismiss the Petition
5 on the ground that it is untimely, or (2) inform the court that respondent
6 is of the opinion that such a motion to dismiss is unwarranted in this
7 case Pursuant to Rule 4 of the Rules Governing Habeas Corpus
8 Cases Under Section 2254.

9
10 Dated: MARCH 10, 2008

11
12 Respectfully submitted,
13 Raymond Franks

14 Raymond Franks
15 In Pro Se
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION AND PROOF OF SERVICE BY MAIL

I, RAYMOND FRANKS, declare under the penalty of perjury that I am over the age of 18 years, () and not a party, or (X) am a party to this action, and reside in Solano County, at P.O. Box 4000, (Cell # 234) Vacaville, California, 95696-4000.

That on MARCH, , 2008, I deposited in the United States Mail at California State Prison - Solano, Vacaville, California a copy of the attached hereof:

*Motion to stay and hold in Abeyance
Petition for A writ of Habeas Corpus*

in a sealed envelope with postage fully prepaid, and addressed to:

*office of the Attorney General
455 Golden Gate Avenue.
San Francisco, CA. 94102*

I declare under the penalty of perjury that the foregoing is true and correct. This declaration was executed on this MARCH, 10, 2008, at CSP-Solano, Vacaville, California, 95696-4000.

Raymond Franks

DECLARANT